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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 682

LUPE ALONZO, JIM ALONZO, JOE ALONZO and VALENTINO ALONZO, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December 23, 1957

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Come now the petitioners in the above-styled case, by the undersigned, their duly qualified attorneys, lodge with the Court this their Petition for a Writ of Certiorari directed to the United States Court of Appeals for the Tenth Circuit to review a judgment entered on September 25, 1957, and in support thereof recite, submit and pray as follows:

I. OPINIONS OF THE COURTS BELOW

The oral statement of the United States District Court for the District of New Mexico, dated March 12, 1957, is to be found in the transcript of record, pages 57-61.

The opinion of the United States Court of Appeals for the Tenth Circuit, dated September 25, 1957, as yet unreported, is for convenience set down as Appendix B to this Petition.

II. JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

III. QUESTIONS PRESENTED

The questions raised here have their setting within the instant controversy. The Alonzos instituted a state court action for ejectment and damages against the Pueblo of Laguna and the Anaconda Company. The United States, professing to act as guardian to an Indian tribe, countered with a suit in the Federal District Court for quieting of title. It asked for an injunction staying the suit in the state court while that in the federal court went forward. The larger issue here is the validity of this injunction.

1. If the United States brings a federal action in behalf of a third party, is it entitled, in disregard of the rule of comity, to an injunction staying a previously instituted proceeding in a state court involving substantially the same matter?

(a) Is the immunity of the United States from 28 U.S.C. § 2283 limited to cases in which it has a property interest of its own, or is it a general immunity available to the United States in all cases to which it is a party?

(b) If the immunity is plenary in character, can it be transferred by the United States to a third party, as, for example, to an Indian Pueblo to which

it professes to act as "guardian" and to a corporation which is a lessee of the Pueblo?

2. In the absence of a positive showing that a guardian-ward relationship now exists or that the lands in dispute are validly restricted against alienation, does the United States have standing to sue in behalf of Indians?

(a) When in the Enabling Act by which it is admitted to the Union a State disclaims jurisdiction over lands acquired "through or from the United States or any prior sovereignty," does the disclaimer comprehend as well lands acquired by purchase?

(b) When by the terms of an Enabling Act a State excepts from its jurisdiction only Indian lands which were acquired "through or from the United States or any prior sovereignty," may the Congress at a later date impose restrictions against alienation upon lands acquired by purchase, thus by unilateral action amending a compact which is bilateral in character?

3. Is the United States acting in accord with equity and good conscience in asking a court of chancery for an extraordinary writ when it selects from among several adequate and available legal remedies the one which permits it to choose the forum and shape the cause of action, in disregard of the rights of other parties to the controversy and in derogation of the sovereignty of a State of the Union?

The matter is not pressed, but it would be remiss not to call the attention of the Court to the opportunity here offered to bring a bit of clarity into "Indian law." A conflict exists between the Court of Claims and the Tenth Circuit, not only in holdings but in philosophies. The approach of the Court of Claims

is current, dynamic and realistic; that of the Tenth Circuit archaeological. As its opinion in the instant case attests, in place of current fact, probing inquiry and biting analysis it substitutes dicta wrenched from context and prompted by situations which no longer exist. A single case may lessen somewhat, though it cannot clear up, the current confusion. The efficient administration of Indian affairs demands the reduction of undefined rules and amorphous concepts to articulate statement.

IV. STATUTES INVOLVED

Citations to the statutes involved in the present controversy are as follows:

The Rule of Comity, 28 U.S.C. § 2283.

Duty to Furnish Attorney, 25 U.S.C. § 175.

In re Restriction on Lands of Pueblos—Section 17 of Pueblo Lands Act of 1924, 25 U.S.C. § 331, Historical Note.

The New Mexico Enabling Act, Section 2(2), 36 Stat. 557, 558-559.

The Pueblo a Juristic Person, N. M. Stat. 1953, Sec. 51-17-1.

The text of the relevant provisions in these statutes is set forth in Appendix A.

V. STATEMENT OF THE CASE

The questions just presented draw their significance from the distinctive circumstances of this venture into litigation.

1. *The Original Case.* On January 28, 1957 the Alonzos filed a suit in the District Court of Valencia

County, New Mexico—referred to hereinafter as State-8016. By this action they sought the ejectment of the Pueblo of Laguna and its lessee, the Anaconda Company, from a part of the tract of land known as the Paguate Purchase, to which the Alonzos claim title. They also sought damages for the value of precious minerals, in particular uranium, which had been taken from the property.

The state court was the proper forum for this suit. The Alonzos could not have instituted the suit in a federal court even if they had chosen to do so. No federal question was involved; there was no diversity; and the subject of the suit—the determination of the ownership of a tract of real property—has been universally treated as lying within the special competence of state courts.[1] The proceeding was sanctioned by, and met all the requirements of, the law of New Mexico. The plaintiffs, as citizens of the State and of the United States, had standing to sue. The Pueblo of Laguna was a proper and suable entity. By an Act of the Territorial Legislature passed in 1847—an Act which still remains on the statute books[2]—it was constituted a body politic, capable of suing and being sued in any court of law or equity with respect to its lands. The fact that the Pueblos of New Mexico are juristic persons has been recognized in many judicial decisions.[3]

In State-8016 the United States was not named as a party defendant, and no item in the complaint

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[1] See, e.g., *United States* v. *Fox*, 94 U.S. 315 (1877).

[2] See. 51-17-1, N.M. Stat. 1953.

[3] See, e.g., *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919) and *Martinez* v. *Martinez*, 49 N.M. 83, 157 P. 2d 484 (1945).

invited a controversy with the Federal Government. The state suit related to and involved rights of the Alonzos growing out of and fixed by transactions antedating the Treaty of Guadalupe Hidalgo by almost a century. It did not involve federal lands. To avoid even the semblance of a dispute, the Alonzos on March 11, 1957 filed a clarifying amendment to their complaint excluding from State-8016 any and all lands to which the United States claimed title, whether in its own right or as held in trust. The state proceeding, therefore, involved only private, non-federal lands held in fee which were acquired, either by the Alonzos or the Pueblo of Laguna, more than a century ago from a non-sovereign third party.

2. *The Blocking Suit.* The strategy of the defense has been not to meet, but to block, State-8016. The Alonzos had filed their action against the Pueblo of Laguna and the Anaconda Company as citizens suing citizens. No reply was made either by the Pueblo of Laguna or by Anaconda. Instead, on February 21, 1957, the United States entered the litigation by filing a blocking suit in the United States District Court for the District of New Mexico to quiet title to the lands in dispute—hereinafter referred to as Fed.-3407. Although this suit was cast in the form of an independent action, it was in reality an answer to the complaint of the Alonzos in State-8016.

By filing this second suit the United States has sought to transfer to the federal courts the suit brought by the Alonzos. The Pueblo of Laguna has been erased as a party to the controversy and the United States has been substituted in its stead. In suing in its behalf the United States treats the Pueblo of Laguna as Indians, not as citizens; it neglects the

fact that the Alonzos are also Indians. The second action converts a suit for ejectment and damages into a suit to quiet title and shifts the case from the law to the equity side of the calendar. In effecting these changes the United States has disturbed the balance of advantage and disadvantage between the contending parties. It has sought not only to select the forum but also to remake the cause of action, in disregard of the rights of the Alonzos as litigants and as citizens.

3. *Liquidation of the State Suit.* To complete the transfer, it was necessary to render State-8016 inactive and to leave Fed.-3407 in complete possession of the field. To that end, the United States moved for an injunction staying State-8016 until Fed.-3407 had been driven to its conclusion.

4. *The Barrier of Comity.* An obstacle to the grant of the stay was that the suit of the Alonzos in the state court had been filed first. The doctrine of comity, which antedates the formation of the Constitution, commands that as between courts of equivalent standing, that one which first obtains jurisdiction is to go forward and the other is to withhold its hand until the prior suit has terminated in a judgment. The United States contends that upon the authority of *Leiter Minerals, Inc.* v. *United States,*[4] it is immune to the mandate of 28 U.S.C. § 2283. The Alonzos contend that the immunity granted to the United States in the *Leiter* case is limited, not plenary, in character—that it does not extend to a case in which the United States has no property interest of its own but appears only as a representative of a third party.

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[4] 352 U.S. 220 (1957).

5. *Comment.* At this point it may not be improper to obtrude a comment. In *Parr* v. *United States*,[5] four Justices of this Court remarked upon the habit of the United States in "shopping around" for the most favorable forum. No one of the other five Justices defended the practice. In the instant case the impropriety—we employ the weakest of the relevant synonyms—of the United States goes far beyond the former instance. In the *Parr* case the United States, by quashing an indictment and instituting a new suit, chose one federal forum as against another. In the instant case the United States, by the devices enumerated above, attempts to transfer the litigation from a state to a federal court. In doing so it realigns the issues and substitutes for the original case a tailor-made suit which it prefers to defend. The blocking tactics employed by the United States present departures from appointed procedure more numerous and with far more serious effects than the practice which was noted with disapproval in the *Parr* case.

6. *Decisions of the Courts Below.* After a hearing on March 12, 1957, the Federal District Court delivered an oral opinion (R. 57-61) which it characterized as "Findings of Fact and Conclusions of Law." In this opinion the standing of the United States to sue was grounded upon an undefined relationship, set down in the amorphous terms of guardian and ward, between the Federal Government and Indians. For the law, reliance was placed largely on the *Sandoval* and the *Candelaria* cases.[6] The

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[5] 351 U.S. 513 (1956).

[6] *United States* v. *Sandoval*, 231 U.S. 28 (1913); *United States* v. *Candelaria*, 271 U.S. 432 (1926).

resulting order of the court stayed the proceedings in State-8016 until a judgment had been entered in Fed.-3407.

From this decision the Alonzos sought a review by the United States Court of Appeals for the Tenth Circuit. At this point the State of New Mexico moved to enter the litigation. Its Petition to Intervene was denied, but it was given permission to file a Brief Amicus Curiae. It insisted that a problem of state-federal relationship is involved; that the judgment of the Federal District Court is a violation of provisions of the Enabling Act by which the State had entered the Union; and that the stay constitutes a serious hazard to the system for the administration of justice which New Mexico has set up.

On September 5, 1957, oral argument was heard by the Circuit Court of Appeals for the Tenth Circuit. On September 25, 1957, the Court of Appeals affirmed the judgment of the court below. It is this judgment which this Court is now asked to review.

VI. REASONS FOR GRANTING THE WRIT

It is obvious that State-8016 and Fed.-3407 constitute a single venture into litigation. At this stage no question of the merits is involved. The sole concern here is the validity of the stay upon the proceeding in the state court, and upon this issue all questions now relevant converge.

1. The United States is not immune from the rule of comity when it appears not in its own interest but only in behalf of a third party.

The dominant issue here is whether the United States may transfer whatever immunity from the rule of comity it enjoys in its own right to a Pueblo

of Indians and to a business corporation which is the lessee of the Pueblo. Here is presented an important issue in federal-state relationships and in the operation of a dual system of courts. The question needs to be handled in a realistic manner—not in terms of the stereotypes and archaic dicta called into play in the forum below. The Court of Appeals has attempted to ground its decision upon the precedent of a case identical with the current suit. But the law reports are to be searched in vain for a precedent which is indistinguishable. In the absence of a case in point, the lower court has attempted to assemble fragments drawn from a number of opinions into a synthetic case shaped as authority for its decision. It has quoted from the *Sandoval* and *Candelaria* cases to establish the capacity of the United States to maintain its federal suit; it has used the *Leiter* case for the proposition that the immunity of the United States from the rule of comity is without bounds; and it has lifted language from the *Hellard* case[7] to the effect that the United States as protector of Indians has an interest as great as if it held the lands in controversy in fee. These larger pieces are supplemented by a number of others of lesser importance drawn from diverse sources. It will suffice here to subject the main fragments to critical analysis.

(a) *The Sandoval and Candelaria Cases.* The United States needed standing in order to institute Fed-3407 and move for the stay on State-8016. Such a standing is to be established only by a demonstration that the guardian-ward relationship now exists or by a showing that the lands involved are currently restricted against alienation. The court below has

[7] *United States* v. *Hellard*, 322 U.S. 363 (1944).

accepted the contention put forward by the Federal Government that the *Sandoval* and *Candelaria* cases furnish adequate authority for its capacity to maintain the suit.[8] This argument is supplemented by reliance upon Section 17 of the Pueblo Lands Act of 1924,[9] which, it is claimed, imposes a blanket restriction on all Pueblo lands.

The petitioners, however, do not admit that the United States is the guardian of the Pueblo Indians or that the lands in dispute here are restricted against alienation, and the Government has made no proper showing that either of these propositions is true.

The *Sandoval* and *Candelaria* cases are invoked as a recognition of some sort of a legal responsibility of the United States towards Indians. The *Sandoval* case involved the validity of a federal statute which prohibited the shipment of alcoholic beverages into Indian country, including the territory of the Pueblos. It presented no question of the relationship of the Federal Government to, or the responsibility upon it for, the welfare of the Indians. The language there set down concerned with this matter is pure dicta, quite irrelevant to the circumstances, the issues or the holdings of the case.

The *Candelaria* case went to the Supreme Court on two certified questions—a procedure not now favored for the resolution of substantive issues of law. These

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[8] There is language in these decisions, even though it be dicta, to the effect that the Pueblo Indians are wards of the Government and that the lands of the Pueblo Indians are restricted against alienation.

[9] Pueblo Lands Act, 43 Stat. 636 (June 7, 1924), 25 USCA § 331, Historical Note.

questions were accompanied by a statement submitted as a stipulation, which was not in accord with the evidence later presented at the trial. The Supreme Court lacks the facilities for fact finding, and the statements in its opinion about restrictions on land and the general obligations of the Federal Government to the Indians constitute a noble and gratuitous essay divorced from the matter at hand. It seems strange that this case has been so often cited and so rarely subjected to any critical analysis.

(b) *The Leiter Case.* The case of *Leiter Minerals, Inc.* v. *United States, supra,* did not involve Indians, but the procedural steps followed there are similar to those pursued in the instant controversy. However, in that case the United States itself owned the property in question, whereas in the instant case it makes no claim of ownership but relies entirely on its protective office in respect to Indians to establish, first, its right to sue and, second, its right to stay the proceedings in State-8016. In the *Leiter* case the original suit in the state court was a petitory action by which the petitioner sought to have itself declared owner of the mineral rights under land owned by the United States. The United States subsequently brought an action in the federal court to quiet title and sought a stay against the state court proceeding. In that case the injunction was granted, but only after the closest scrutiny with regard to its effect on the long-standing rule of comity. The decision to stay the state suit and let the federal suit go forward did not disturb the balance of advantage between the adverse parties. The plain implication is that the Supreme Court intended its decision to be applicable only in the circumstances of that particular case. The

attempt of the court below in the instant case to extend the doctrine to a wholly different situation is clearly an expedition into judicial law-making.

The attorney for the United States in the argument before the Federal District Court stated that he was content to rest his whole case on the *Leiter* decision. In the Government's brief prepared for the court below it was argued that the United States is completely immune from the rule of comity as a result of that holding. It is obvious, however, from an analysis of Mr. Justice Frankfurter's language in the *Leiter* case that it was not the intention of the Court to grant to the Federal Government such a sweeping immunity. His sensitive and alert realization of the difficult terrain to be traversed before such immunity can be recognized stands in sharp contrast to the bold and blind way in which the Court of Appeals has in this case plunged headlong into judicial legislation.

It is stated in the *Leiter* opinion that the right of the United States to a stay upon a state action is clear if, and only if, "the prerequisites for relief by way of injunction be present."[10] In the instant suit the court below did not even attempt to find these prerequisites, and in its brief the United States contended that they did not have to be met. In the *Leiter* case the United States demonstrated an interest of its own; in the instant case it relies upon a general, undefined and undemonstrated responsibility which it professes to have towards an Indian tribe.

Even after Mr. Justice Frankfurter adopted an interpretation excluding the United States from the coverage of 28 U.S.C. § 2283 in the *Leiter* case, he still

[10] 352 U.S. at 225.

deemed it necessary to decide "the question . . . whether the granting of an injunction was proper in the circumstances of this case."[11]

If, in accordance with the ordinary rules of construction, the holding in the *Leiter* case is to be read in terms of the circumstances which prompted it, the immunity granted to the United States is alike finite and concrete. It is limited to suits in which the United States has a material interest of its own and does not extend to cases in which it is in court in another capacity. The court below, however, following the lead of the respondent, insists that this immunity is absolute and without fixed bounds. It has held accordingly that the immunity applies to the United States when it is involved in litigation in behalf of a third party, and that the immunity may be transferred to an Indian Pueblo and even to a business corporation which has leased mineral rights from the Pueblo. There is nothing in the opinion of the Court in the *Leiter* case to warrant such a transfer of the immunity of the sovereign to alien parties.

In times like these, when the security of the nation is at stake, a decent respect for our system of justice—federal and state—is imperative. The Constitution itself has set down "domestic tranquillity" as a great objective of policy. The framers of that instrument granted to the "general government" powers only in those matters which lie beyond "the competence of the several states." There has been brought into our dual system of courts the harmonizing effect of the ancient rule of comity, without which the peaceful maintenance

[11] 352 U.S. at 226.

of law and order would be beset with difficulties. If the immunity of the Untied States to 28 U.S.C. § 2283 is absolute and unconfined and valid in any capacity in which it sues in behalf of itself or a third party, it becomes a grant of power without an imposition of responsibility. In this age when personal, corporate and public affairs are inextricably intertwined, there is a multiplex of capacities in which the Federal Government can claim to have an "interest" in individual and business controversies. If, on any plausible pretext, the United States may institute a federal and stay a state action, the administration of our dual system of justice will be subjected to a stress and strain it cannot bear. It would be dangerous to endow the Attorney General of the United States—an appointed official—with such a weapon for creating a judicial imperium. It is the very genuis of our law that a mandate is to be chiseled into concrete command. If the immunity of the United States is finite, its bounds should be set. If the immunity is free of all limitations, a cleancut declaration to that effect should come from the Court which has the ultimate power to declare the law.

(c) *The Hellard Case.* Even a cursory reading of *United States* v. *Hellard, supra,* will reveal its unlikeness to the current controversy. In that case the subject matter of the suit was allotted land, with restrictions imposed in specific terms by Act of Congress; in the instant case there has been no adequate showing that the lands in question are restricted. The state court action in the *Hellard* case was a partition proceeding, and the dominant issue in the federal court was the validity of an auction at which Indian lands were being disposed of. The function of the United States was to make certain

that the lands were not improvidently alienated. In the instant case the basic question is whether the Alonzos or the Pueblo of Laguna is, and from an undetermined date in the past has been, the lawful owner of a specified tract of the Paguate Purchase. No question of protection of Indians against their own improvidence in the alienation of land is involved. In the *Hellard* case there was no question of a stay on a state court proceeding. There the United States was challenging the validity of a judgment which had emerged after the state case had reached its conclusion. In the instant case a stay is sought before the state proceeding gets under way, for which neither the *Hellard* nor other cases offer any precedent.

The *Hellard* case is cited by the court below not for its holding, but for its language. A couple of sentences lifted out of context are employed to the end of bringing the instant case within the immunity of the United States as recognized in the *Leiter* decision. In the opinion of the Court in the *Hellard* case it is stated:

> "Restricted Indian land is property in which the United States has an interest. . . . The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States." 322 U.S. at 366.

The court below, in an exaggerated form, has adapted this language to the instant case. It has stated:

> "We are of the opinion that the Governmental interest in the instant action is as great as it would be if the fee to the lands involved were in the United States. Indeed, since the United States is suing as a guardian of a dependent nation in discharge of a fiduciary duty, its right and duty

> to protect the interests of its wards may be even greater than it would if it were suing in its own behalf with respect to its own lands."

As a legal maxim, there can be no dispute with this precept. A fiduciary office does impose a sacred trust; its obligations are at law even more binding upon a trustee than upon an owner of property. In the instant case, however, no fiduciary office in behalf of any party to this suit has been shown. If it exists, it extends to the Alonzos as fully as to the Pueblo of Laguna, and only by contagion to the Anaconda Company. An office can hardly be called fiduciary when its discharge is voluntary, not mandatory, in character.[12]

The court below confuses its argument by employing the word "interest" to describe two things distinct in character. It uses the word as a name for the equities in the land held by its owner in fee; it uses the same word to describe the duty, obligation or responsibility which devolves upon the United States in respect to Indians. But the interest of the owner and the obligation of the Federal Government are utterly unlike in kind, in substance and in action, and invite distinct roles in judicial procedure. The distinction between offices needs to be reflected in a distinction between words. But by whatever term the obligation of the United States—if any—is described, the language quoted is irrelevant to the issue of an order of a federal court staying an action in a state court.

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[12] See *Siniscal* v. *United States*, 208 F. 2d 406 (9th Cir. 1953), cert. den. 348 U.S. 818 (1954).

Thus, these three fragments, woven into a synthetic case, fall short of furnishing a precedent for the disposition made of the current controversy by the court below.

2. Although as the mover it has the burden of proof, the United States has failed to demonstrate its standing to enter the current litigation.

It is not clear what place, if any, the United States has in this litigation. The Pueblo of Laguna and the Anaconda Company are alike possessed of adequate resources and are here represented by counsel whose competence is not subject to question. The authority which the United States invokes for standing to sue is that of protector of an inferior people. In this role its obligation is in respect to Indians, not an Indian tribe. Its responsibility to the Alonzos is as great as to the Pueblo of Laguna. It lacks any sanction for preferring the Pueblo to the Alonzo family, or for extending its help to the stronger as against the weaker parties to the litigation. Its office of protector, if it has such an office, is an impartial one. As between an Indian family and a Pueblo of Indians, its duty is to insure a fair field and no favors. No obligation rests upon the United States to champion the interests of Anaconda in court. It is difficult to visualize a great corporation as in a "state of tutelage," unable to manage its own affairs and needing the protection of the Federal Government.

In the instant controversy the standing of the United States may be established by a showing that either there now exists a guardian-ward relationship between the United States and the parties defendant in the state action or that the lands which are the subject of the current litigation are lawfully restricted

against alienation. In the Federal District Court the standing of the United States was predicated upon an amorphous, undefined and unbounded relationship of guardian to ward. In the Court of Appeals this standing was grounded upon a sta. ment, unsupported by any direct testimony, ..at the lands in question are restricted against alienation.

(a) *The Relation of Guardian to Ward.* The guardian-ward relationship as applied to Indians is among the most amorphous concepts of the law. It is inexact, derives from an uncertain authority, is based upon no statutory enactment, has long been viewed with suspicion, and carries with it no concrete legal command. Its currency in the Tenth Circuit is in striking contrast with the critical attitude towards it by the leadng authority on Indian law[13] and to the caution which attends its use by the Court of Claims. In two cases the United States Court of Claims has recently held that:

> "Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends . . . upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presented arises."[14]

No treaty, agreement, executive order or statute recognizing such a relationship between the United States and the Pueblo of Laguna exists.

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[13] Felix S. Cohen, Handbook of Federal Indian Law, 1945 Edition, published by the Department of the Interior, pp. 169-173.

[14] *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780 (1956) and *Sioux Tribe of Indians* v. *United States*, 146 F. Supp. 229, 237 (1956).

In an answer to a complaint brought against it by the Pueblo of Laguna—the same Pueblo involved here—the Federal Government has stated that an ordinary guardian and ward relationship between the United States and the Pueblo of Laguna does not exist.[15] Yet in the proceedings below there has been reliance upon such a relationship as a basis for the standing of the United States. The unrestrained power of the United States to decide when it is and when it is not to act as guardian is out of accord with its avowal of a fiduciary relationship. In two cases in which the same parties are involved, the United States would seem to be estopped from serving its own advantage by invoking an outmoded concept in the one and disavowing it in the other.

(b) *Restriction on Alienation.* It is not strange, therefore, that the court below found it expedient to ground standing upon the added sanction of restriction on alienation. However, the only showing by the Federal Government of such a restriction consists of reference to the *Sandoval* and *Candelaria* cases and the citation of Section 17 of the Pueblo Lands Act. The *Sandoval* case was concerned with an exercise of the federal police power to keep firewater out of the hands of Indians. No issue in regard to equities in land or its federal regulation was involved.

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[15] *Pueblo of Laguna* v. *United States*, Indian Claims Commission, Case No. 227. In a similar suit involving the Pueblo of Cochiti, the United States in its answer specifically denies that "Such Indians have at all times been unfamiliar with the ways and language of the white man, ignorant and uneducated, and not in any way capable of protecting and asserting their own property rights." *Pueblo of Cochiti* v. *United States*, Indian Claims Commission, Case No. 136.

In the *Candelaria* case the opinion of the Supreme Court was given in advance of trial and not upon appeal—in answer to certified questions and not upon the review of a final judgment. Neither of the questions presented was concerned with restrictions on land. It was through this opinion that a rider to the Appropriations Act of 1851[16] was given currency. Section 7 of that Act extends "all the laws now in force, regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable" to the Territories of New Mexico and Utah. The laws to which reference is made are obviously those on the statute books, but the spokesman for the Supreme Court does not enumerate these laws and gives no consideration to those which are and those which are not applicable to the Territory of New Mexico. The dominant code of Indian law was at that time the Act of 1834,[17] and the conditions of Indian life which prompted it have now passed into oblivion. It is not promising to expect to find a restriction on land within so remote, so archaic and so vague a body of law.

It is significant that in the decades just before New Mexico was admitted to the Union such restraint as these ancient statutes may have imposed upon alienation seems to have been given no effect insofar as Pueblo lands were concerned. A number of private land claims affecting Pueblo Indians which came before the courts in that period went forward to judgment upon the assumption that their lands were not restricted.[18] In the *Conway* case it is stated that the

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[16] 9 Stat. 587 (1851).

[17] 4 Stat. 730 (1834).

[18] See, e.g., *United States* v. *Conway*, 175 U.S. 60 (1899) and *United States* v. *Baca*, 184 U.S. 653 (1902).

Act by which the land there in issue had been confirmed to certain Indian Pueblos

> "operated . . . to release to the Indians all the title of the United States to the land covered by it and passed the title of the United States as effectually as if it contained in terms a grant de novo."[19]

The lands involved in the current controversy were confirmed to the Pueblo of Laguna by Act of Congress of June 21, 1860,[20] in the same manner as the lands in the *Conway* case had been confirmed. By a Letter Patent dated September 22, 1884, the United States specifically entered a quit-claim in respect to any interest which it might have in these lands. The instrument stated in explicit terms that its issue "shall not affect the adverse rights of any person or persons whomsoever." In 1904 the Territorial Court of New Mexico, in *Territory* v. *Delinquent Taxpayers*,[21] held:

> "We conclude, therefore, that the Pueblo Indians of New Mexico are citizens of New Mexico and of the United States, hold their lands with full power of alienation, and are, as such, subject to taxation."

By the Act of March 3, 1905,[22] the Congress nullified that part of the holding which granted exemption from taxation but failed to impose any restriction on alienation. These holdings seem to put it beyond peradventure that the lands of the Pueblos were not

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[19] 175 U.S. at 67.

[20] 12 Stat. 71 (1860).

[21] 12 N.M. 139, 147, 76 P. 307, 309 (1904).

[22] 33 Stat. 1069 (1905).

restricted at the time the State of New Mexico was admitted to the Union.

(c) *The Enabling Act.* Section 2(2) of the New Mexico and Arizona Enabling Act[23] provided in part that the people of the state "do agree and declare that they forever disclaim all right and title" to lands "acquired through or from the United States or any prior sovereignty."[24] There was no disclaimer in respect to lands which had been acquired by purchase.[25] The reason for the distinction is clear. If lands are acquired from a sovereignty they may be subject to actual or potential restriction. If lands are aquired by purchase, the presumption is that they are free of such restriction. This Court has held:

> "Whenever, upon the admission of a State into the Union, Congress has intended to except out of it"—that is, the state—"an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words."[26]

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[23] 36 Stat. 557, 558-559 (1910).

[24] The language of this provision, written into the Constitution of New Mexico, is in striking contrast to similar provisions in the Constitutions of Utah, North Dakota, South Dakota, Montana, Washington and Oklahoma. In the Enabling Acts and Constitutions of these states the states disclaim regulatory power over Indian lands however acquired and the disclaimer is not limited to lands "acquired through or from the United States or any prior sovereignty."

[25] The lands involved in this controversy were acquired, either by the Alonzos or the Pueblo of Laguna, by purchase from private individuals and not through or from the United States or any prior sovereignty.

[26] *United States* v. *McBratney,* 104 U.S. 621, 623-624 (1882).

If it had been the intent of the parties that the people of New Mexico disclaim all Indian lands however acquired, the Congress was able to say so.

In *Prince* v. *Trujillo*,[27] the Supreme Court of New Mexico, in a clear and unconfused interpretation of the language quoted above, stated:

> ". . . this provision did not in any wise fetter or limit the Indian if a resident of this state so far as to deny to him any right political or otherwise enjoyed by any other resident of this state. The only restriction was as to his title to land acquired by him by virtue of the laws of the United States or any prior sovereignty . . ."

In disregard of historical facts, the canons of construction and the authority cited, the spokesman for the court below has held, "the restrictions against alienation apply to lands acquired by the Pueblo through purchase, as well as to lands acquired by the Pueblo in any other manner." By this error in interpretation the court below fortifies the standing of the United States to sue.

(d) *The Pueblo Lands Act.* It is, however, argued by the court below that even if the lands in question were unrestricted at the time New Mexico became a state, the deficit was filled by Section 17 of the Pueblo Lands Act of 1924. The Enabling Act was bilateral in character. It took the form of a compact between the United States and the state seeking admission to the Union. It is an axiom of the law that an instrument bilateral in character cannot lawfully be amended by unilateral action. Moreover, the very Act by which New Mexico became a state recognizes

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[27] 42 N.M. 337, 78 P. 2d 145, 152 (1938).

the bilateral character of the compact then entered into. It requires that the people of New Mexico disclaim certain territory "by an ordinance irrevocable without the consent of the United States and the people of said States."[28] In place of this solemn and mutual understanding, the court below has substituted a dictum of its own to the effect that "such restrictions were clearly reimposed by Section 17 of the Act of 1924."

The very language of Section 17 defies the interpretation placed upon it by the court below. The purpose of the Act was to clear up the confusion existing at that time in respect to the lands of the Pueblos. Section 17 was added to guard against the improvident swearing away of their lands by Indians. The key word in the section is "hereafter", giving to the section a prospective and not a retrospective effect. To apply it to the instant case is to make its provisions retroactive. It was not intended to preclude the settlement of disputes between Indians concerning pre-acquired rights. There is nothing in the language employed or in its legislative history to indicate that in its passage the Congress had the slightest intent to legislate in respect to judicial proceedings designed to determine the ownership of lands. In the New Mexico of today it is everyday practice for Indians, as citizens of the United States, to buy and sell land without going through the complicated ritual set up in Section 17. It would be high irony if an Act, the purpose of which was to put an end to the confusion in Pueblo land titles, was to be interpreted in such a way as to compound that confusion.

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[28] 36 Stat. 558 (1910).

3. In a court of chancery the United States is not acting in accord with equity and good conscience when it chooses from among several available remedies the one which does greatest violence to the rights of other parties.

A court of equity is a court of conscience. A maxim alike ancient and universal is that the party who asks equity must do equity. The mandate to come into court with clean hands rests as squarely upon the Federal Government as upon a private litigant. As a representative of all the people and not a single interest, the Government is under an even greater obligation of fair play than is the ordinary suitor.

If the United States can establish its right to be a party to the case, at least three alternative moves are open to it: (1) It may formally attempt to enter State-8016 or furnish an attorney or attorneys to represent the Pueblo of Laguna therein; (2) it may await the outcome of the proceeding in the state court and take such action as then seems appropriate; or (3) it may, if it is valid for it to do so, initiate a federal action and seek to stay the case in the state court.

(a) *Entrance into State-8016.* The United States has contended that it is an indispensable party to State-8016, yet it cannot become a party to that action. Such a statement is merely self-serving and has no authoritative support. If this were true it would reveal an anomaly which has no place in a responsible legal system. That such an anomaly does not exist is attested by the ruling of this Court in *United States v. Bank of New York & Trust Company,*[29] where the Court says that if it goes into a state court "We cannot see that there would be impairment of any rights

[29] 296 U.S. 463 (1936).

the United States may possess, or any sacrifice of its proper dignity as a sovereign . . ."[30] A State of the Union possesses its own sovereignty, and in *Massachusetts* v. *Missouri*[31] this Court formally counseled the Commonwealth of Massachusetts to institute its case in the courts of the State it was suing.[32]

No interest of its own impels the United States to enter the current controversy. Its avowed role is that of protector of Indians. The obligation connected with that office applies as much to individuals as to Indian tribes—as much to the Alonzo family as to the Pueblo of Laguna. There appears to be no statutory sanction for an intrusion by the United States into a private controversy between Indians. The rationale of the protective office of the United States with respect to Indian affairs is that if an Indian interest is put in jeopardy it is the duty of the United States to assure an adequate defense. In instances in which an Indian or Indians are able to choose and to afford adequate legal talent, there would seem to be no call for intervention by the Federal Government, but if an Indian or Indians lack the resources to employ competent counsel the responsibility rests upon the United States to fill the void. Thus the Congress has found it necessary to go no further than to specify, in 25 U.S.C. § 175, that "In all States and Territories where there are

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[30] 296 U.S. at 480-481.

[31] 308 U.S. 1 (1939).

[32] It is evident, of course, that to enter the state court the United States would have to meet the prerequisites and that its motion to intervene would doubtless be challenged by the party adverse to that which it is seeking to aid.

reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity." This legislative mandate applies to state as well as to federal courts. The protective office of the Federal Government is to be exercised whenever and wherever a hazard to Indian rights appears.

The practice of the United States has conformed to this mandate. In the *Candelaria* case, after this Court answered the certified questions put to it by the Circuit Court, the lower court held that because an attorney had been made available the United States was bound by the final judgment of the territorial court.[33] In *Martinez* v. *Martinez, supra,* the United States furnished a battery of ranking attorneys. There is no reason why the precedent thus set should not be followed here.

The contention that the United States cannot be sued without its consent has no relevancy in the current situation. It enters this controversy not to protect an interest of its own but to discharge a responsibility in behalf of a third party. It has no stake of its own in the outcome of the case, and consequently it is not being sued. As this Court has said in another connection but in language applicable here:

> "There is no merit in the suggestion that the United States, in presenting its claim in the state proceedings, would be compelled to take the position of a defendant—being sued without its consent. In intervening for the presentation of its claim, the United States would be an actor—

[33] *United States* v. *Candelaria,* 16 F. 2d 559 (1926).

voluntarily asserting what it deemed to be its rights—and not a defendant."[34]

In the instant suit the United States does not appear in a defensive role, and hence the court below was in error in quoting as applicable the statement in the *Leiter* case to the effect that "since the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum . . ."[35]

The United States contends that it may at its will enter or keep out of the state suit. If it enters, it will be bound; if it stays out, it claims that the resulting procedure would be a nullity.[36] Thus it argues that it may act arbitrarily in the discharge of a function which it insists is fiduciary in character, regardless of the impact upon proceeding or parties. An office of trust carries with it the powers necessary to its proper discharge. If here a fiduciary office exists, the Federal Government is clearly under a mandate to go into the state court. The claim of arbitrary power—and disclaimer of responsibility—for the United States is a vestige of the old royal prerogative, the abatement of which has given us one of the most glorious chapters in legal history. In a system of

[34] *United States* v. *Bank of New York & Trust Company*, 296 U.S. 463, 480 (1936).

[35] 352 U.S. at 228.

[36] In reality, if not in form, the United States is a party to the state action. State-8016 and Fed.-3407 constitute a single venture into litigation. The United States is attempting from the vantage point of plaintiff in Fed.-3407 to control the proceedings in State-8016. It is as clearly involved in the latter case as if it had there entered a formal appearance. The failure formally to appear attests its desire to dominate the state suit and yet to escape the responsibility which its formal presence would impose.

constitutional government, where all persons, whether as individuals or officials, have to "answer in another place" for their acts, such a claim of irresponsible authority has no place.

(b) *Right to Challenge State Court Judgment.* There is ample precedent for the United States waiting until the state proceeding has run its course, and then, if dissatisfied with the result, moving for modification or cancellation. In answer to one of the certified questions presented in the *Candelaria* case, this Court stated in effect that the United States would not be bound by the previous territorial court proceeding if it had not furnished an attorney there, and could therefore bring a subsequent suit. In the *Hellard* case it was held that under specified circumstances the United States might challenge the decree of a state court. Even in the *Inaba* case,[37] which comes closest to supplying a sanction for the writ here in question, the stay on the state proceedings ran only in favor of the United States and was not to affect the rights of other parties; the subject matter of the suit was not transferred from the state to the federal forum.

It is argued by the Federal Government that the United States cannot be forced to become a party to a state suit and that the ensuing decree would be void. It may be, in legalistic terms, that the United States is not "bound", but our dual system of courts can be administered only upon the hypothesis that the state and the federal courts are of equivalent standing. It cannot be presumed that the federal dispenses a better justice than the state courts. There

[37] *United States* v. *Inaba*, 291 Fed. 416 (D.C. Wash. 1923).

must be a presumption that the action of the state court will be carried through in the spirit of justice and fair play. Its decree at the very least would bind all parties to the controversy, save the United States; it would not be automatically void because of the absence of the United States as a party. The real question is the process by which the decree is to be voided. In practical against theoretical terms, if a fair trial has been had, it behooves the United States to withhold its hand. If, however, there is error in the conduct of the trial or in the result, the United States would then have an opportunity to challenge a provision in the decree, to move for an amendment, or to ask that the judgment be voided. In the great majority of suits there will be little or nothing for the United States to complain of. A felt need to set the mandate aside will be an exceptional, not the ordinary, thing.

It is argued that since the United States can act after the state proceeding is completed, the federal forum is the only one in which all the issues can be resolved. That proposition, exact as it was under the circumstances of the *Leiter* case, is untrue here. It is true in the instant case only if it be assumed that the judgment of the federal court will be in favor of the United States. The issues of possession, ejectment and damages raised in State-8016 can be fully adjudicated and a binding judgment entered only by the state court. In the federal court the Alonzos cannot counterclaim in respect to possession, title or damages, because there is no consent to sue the United States.[38] With this obstacle, the only judgment which the federal court can enter, if it decides against the

[38] *United States* v. *Shaw*, 309 U.S. 495 (1940).

United States, is a refusal to quiet title. Should the Government fail to sustain its allegations, the state suit would have to proceed in order to determine the right to possession and the amount of damages suffered by the Alonzos. There is the possibility of a second suit no matter where this case is originally tried. If it is tried in the federal court and the United States is unsuccessful, the Alonzos can secure relief only by going forward with their state court action; if it is tried in the state court and the Alonzos are successful, it is possible that the United States might seek to modify or set aside the judgment.

In a situation beset with such diverse possibilities, the tribunal before which the case was first instituted should be permitted to go forward and the other court should stay its hand. A judgment of a state court, if subject to attack can be more intelligently challenged after it has taken shape than before it is made. This procedure is not only logical, but is the one which has normally been followed. As is stated in *Martinez* v. *Martinez, supra:*

> "The United States may sue to cancel the old decree, as has been its procedure when not satisfied with decrees in such causes in which it was not a party, . . ."[39]

(c) *Substituting a Federal Suit.* In spite of these two remedies, alike adequate and fair, the United States has chosen a third course which confuses the litigation and does injury to litigants. It has instituted a federal suit and sought a stay upon the state action.

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[39] 49 N.M. at 97, 157 P. 2d at 493.

For the issue of the injunction staying State-8016 there is no statutory authority. It rests, if it exists at all, upon the general immunity of the United States to 28 U.S.C. § 2283, and, as the absence of citations demonstrates, there is no precedent for its employment in behalf of any third party. Its use has been limited to cases in which the suits in the state and the federal court involve identical or similar causes of action. There is no authority for the stay in an instance in which the cause of action is remade in such a way as to disturb the balance of advantage between the parties.

The intrusion of the United States into this case involves an encroachment upon the rights of the Alonzos as litigants and as citizens. It is an axiom of the law that the plaintiff has the right to try his own case—not one contrived for him by the defendant or an alien party. By entering this litigation and indirectly removing the case from a state to a federal court and transmuting it from a suit at law to a suit in equity the United States has swept away the right of the Alonzos to a jury trial. This right should not be denied or even abridged through an extraordinary writ whose employment is itself limited to the rarest of occasions. The action of the United States has also deferred the relief sought for an indefinite period, to be played upon by all the forces of judicial erosion. The United States has exhibited, and the court below has cited, no case in which a stay imposed upon a state proceeding by a federal court has involved such an invasion of the civil rights of the plaintiffs.

It may be that the United States is legally free to choose the remedy which is most advantageous to it, but the judiciary is not without power to exercise

pressure upon the Federal Government to do the decent thing. It can, by a refusal to sanction a stay upon the state proceeding, help to make the arbitrary path of the United States more difficult. Above all, the Court can avoid becoming an accessory to the inequitable practices of the United States in seeking to choose its own forum in disregard of the rights of other parties to the controversy. In a word, by granting or withholding the stay, the judiciary may enhance or diminish the advantage which the Government seeks in arbitrary and irresponsible action. The courts cannot afford to become a party to an inequitable procedure when an alternative remedy is immediately available. This venture into litigation has ceased to be a suit between private parties. It is now affected with a public interest. The call is for judgment in terms of the realities and in accordance with the fundamental principles of "equity and good conscience."

Is it equity and good conscience for the United States not only to choose the forum but also to remake the cause of action?

Is it equity and good conscience to tilt the balance of advantage in the litigation in favor of the Pueblo of Laguna and to the detriment of the Alonzos?

Is it equity and good conscience, when three alternative remedies are available to the United States for the protection of such interest or responsibility as it can demonstrate, for it to choose the one which rides roughshod over the rights of the Alonzos as citizens and as litigants?

Is it equity and good conscience for the United States to ground its standing in Fed.-3407 upon the

relationship of guardian to the Pueblo of Laguna as ward when in another case in which the Pueblo of Laguna is the plaintiff it insists that no ordinary relationship of guardian and ward exists between it and the Pueblo of Laguna?

Is it equity and good conscience to claim the tutelage of the Indians on the ground that they are a primitive and uncivilized people, unable to regulate their own affairs, when in another case involving an Indian Pueblo which in no material respect differs from that of the Pueblo of Laguna it disclaims every essential to a primitive and uncivilized state?[40]

These and like contrivances by means of which State-8016 has been tailored into Fed.-3407 go far beyond the activity which drew the reproof of four Justices in the case of *Parr* v. *United States, supra.* If there must be an unprecedented venture into judicial law-making, it should be touched off by a litigant who comes into chancery with clean hands.

CONCLUSION

WHEREFORE IN THE PREMISES your petitioners plead:

1. That the Writ of Certiorari here asked for be granted, directed to the United States Court of Appeals for the Tenth Circuit, and

2. That in summary judgment the decree of the court below be vacated and the case be remanded with instructions to dismiss the injunction staying the action in State-8016; or in the alternative, that a hear-

[40] See Pueblo of *Cochiti* v. *United States, supra.*

ing be granted at which this Court may conduct whatever other and additional inquiries it deems necessary to a just disposition of the instant case.

Respectfully submitted,

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